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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1960

No. 731

UNITED GAS PIPE LINE COMPANY,
Petitioner,
v.
IDEAL CEMENT COMPANY,
Respondent.

No.

UNITED GAS PIPE LINE COMPANY,
Petitioner,
v.
SCOTT PAPER COMPANY,
Respondent.

PETITIONS FOR WRITS OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITIONS FOR WRITS OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that writs of certiorari be issued to review the judgments of the United States Court of Appeals for the Fifth Circuit reversing the judgments of the United States District Court for the Southern District of Alabama. As permitted by paragraph 5 of Rule 23, a single petition is submitted as these two cases were decided by the same Court below and involve identical questions.

Opinions Below

The opinion of the District Court dated September 25, 1959, is reported at 176 F.Supp. 748, and appears at pages 81-96 of the record in the Scott Paper Company case and pages 86-100 of the Ideal Cement Company record.

The opinion of the Court of Appeals dated September 2, 1960, is reported at 282 F.2d 574 and its opinion of October 5, 1960, denying the first petition for rehearing is reported at 282 F.2d 580. The opinion of the Court of Appeals of November 16, 1960, clarifying its earlier opinions and denying the second petition for rehearing is reported at 282 F.2d 580. Copies of all opinions of the Court of Appeals are appended.

Jurisdiction

The judgment of the Court of Appeals in each of these cases was first dated September 2, 1960, and thereafter entered on November 16, 1960.

The first petition for rehearing was denied by an opinion and order dated October 5, 1960. The second petition for rehearing was denied by a clarifying opinion and order dated November 16, 1960, and this is the effective date of each judgment. (See order of Court of Appeals of December 27, 1960, in supplemental transcript.)

Jurisdiction is conferred on this Court to review the judgment in each case by writ of certiorari by Title 28, Section 1254, of the United States Code.

Questions Presented

(1) Does the commerce clause of the Federal Constitution immunize an interstate pipe line company making direct sales of gas to industrial consumers in the City of Mobile from a city license tax on the privilege of conducting that business in the City?

(2) Is a license tax on the privilege of selling natural gas the equivalent of a tax on the preceding interstate delivery or transportation of the gas?

Constitutional Provision and Ordinance Involved

The commerce clause of the Federal Constitution, Clause 3 of Section 8, Article I, is as follows:

> "The Congress shall have power
>
> * * * * * * * *
>
> to regulate commerce with foreign nations, and among the several states, and with the Indian tribes;"

The pertinent portions of the license code of the City of Mobile are the clause levying annual license taxes and paragraph 193 of the schedule, as follows:

> "And each and every person, firm, company, association, partnership, agency or corporation, wherever located, engaging in or carrying on or doing any act or thing herein specified, in or from the City of Mobile, Alabama, shall pay to the City of Mobile an annual license therefor as follows, to-wit:
>
> * * * * * * *
>
> "193. GAS COMPANIES: Each person, firm or corporation engaged in the business of selling or distributing natural gas, in an amount equal to 3% of the gross receipts for the business transacted by such person, firm or corporation, in the City of Mobile for the preceding year from the sale of such natural gas sold or distributed from any point or points in the City of Mobile by such person, firm or corporation for any purpose whatsoever.

"The provisions of the above paragraph to be applied to operation in the Police Jurisdiction on the basis of 1½% of said gross receipts."

Other provisions of the City License Code, which in our view were erroneously considered by the Court of Appeals, are set forth in the original opinion of September 2, 1960, which is appended.

Statement of the Case

The basic issue in these cases is whether an interstate pipe line company may enjoy the protection and benefits of municipal government in making direct sales of gas to industrial consumers in a city and yet escape a municipal license tax on such privilege by reason of the commerce clause.

These cases originated as suits by the petitioner, United Gas Pipe Line Company, (sometimes referred to as "United"), against respondents, two of its industrial customers, for contractual reimbursement of taxes paid by United to the City of Mobile. The city levies an annual license tax on the business of selling or distributing natural gas measured by gross receipts from sales in the preceding year (3% of sales in the city and 1½% of sales in the adjoining police jurisdiction).

The respondents "Ideal" and "Scott" defended on the ground that their reimbursement obligation is limited to taxes validly imposed and that the application of the license tax to sales by United to industrial consumers located within the City of Mobile (or its police jurisdiction) offends the commerce clause of the Federal Constitution. Petitioner (United) was thus forced into the unique position of contending for, instead of against, the validity of a heavy tax levied upon it.

In the District Court both sides moved for a summary judgment in both cases. The motions of United were granted and final judgments were entered against Ideal and Scott on September 25, 1959, awarding full reimbursement. The Court of Appeals reversed.

The sole issue is whether the Mobile license tax is a tax directly on the flow of interstate commerce. Ideal and Scott admit their contractual obligation to reimburse United if the license tax itself is valid. There is no claim that the tax is discriminatory against interstate commerce, or unfairly apportioned, or unreasonable in amount, or beyond the charter power of the City of Mobile.

United is an interstate pipe line company. The gas it sells to Ideal and Scott in Mobile is brought into Alabama from nearby states through United's own transmission lines. Delivery from a point near the city limits to the individual plant sites in the city or its police jurisdiction is accomplished through the distribution lines of the local independent gas company, the same lines that supply industrial, commercial and domestic consumers who purchase from this local distributor. Ideal and Scott have no gas storage facilities. The gas is consumed as it is delivered and each customer therefore determines the quantity it purchases by its rate of consumption at the point of delivery. Until then the gas has been an unidentifiable part of the great volume of gas in the transmission lines of United and the distribution lines of the local gas company and just as readily could have gone to any one or more of the thousands of industrial, commercial and domestic consumers in the city and its police jurisdiction supplied through the same lines. Had the gas reached any of these other customers the license tax would have applied to the sale, but the Court of Appeals has placed the sales to Ideal and Scott (and to the five other industrial

consumers to whom United sells directly) beyond the reach of the tax.

The contracts between United and the two respondents specifically require that the gas be delivered to their respective plant sites in Mobile. (Ideal R 52; Scott R 42) Also, United is required to meter the gas and regulate its flow at the plant sites and the contracts grant United easements with right of ingress and egress for the performance of these local acts. (Ideal R 43, 52; Scott R 33, 42) The records of sales and deliveries are maintained at the office of United's agent in Mobile; the customers are billed from that office and payments for the gas made to that office. (Ideal R 33; Scott R 22)

Taking advantage of the distribution lines of the local gas company, Mobile Gas Service Corporation, United contracted with it to make the within-the-city deliveries to the plant sites of Ideal and Scott (and the five other direct purchasers from United). United's contract with Mobile Gas Service Corporation also engages the latter, as agent for United, to meter the gas at its point of delivery at respondents' plant sites in the city, and to prepare and send out the bills and collect the accounts from these industrial consumers, all at its office in the City of Mobile. (Ideal R 62-80; Scott R 57-75) United compensates Mobile Gas Service Corporation for all of these services at the rate of 2¢ per thousand cubic feet of gas sold to the industrial consumers.

In practice Mobile Gas Service Corporation collects United's entire bill from the industrial consumer, deducts its compensation and remits the balance to United. Stated simply, United charged Ideal and Scott approximately 23¢ per thousand cubic feet for the gas they consumed in the period in question. United's agent, Mobile Gas Service Corporation, collected the full sales price from Ideal and

Scott, retained 2¢ per thousand cubic feet as its compensation and remitted 21¢ to United.

Mobile Gas Service Corporation included its 2¢ per Mcf. in its gross receipts upon which its Mobile license tax was computed, but was reimbursed the amount of the resulting tax by United pursuant to their contract. United in turn is entitled under its contracts with Ideal and Scott to recover the amounts so reimbursed to Mobile Gas Service Corporation as well as the taxes United paid direct to the City of Mobile on the 21¢ per Mcf. it received. In denying the second petition for rehearing the Court of Appeals reached the strange and, we submit, unsupportable conclusion that the tax is valid as to the 2¢ per Mcf. of United's sales price retained as compensation by its agent but not the remaining 21¢ the agent remits to United.

The independent local distributor supplies all of the domestic, commercial and industrial users of gas in Mobile except Ideal and Scott and five other industrial consumers who purchase direct from United. The local distributor purchases its gas at wholesale from United and takes delivery into its distribution system at metering stations near the city limits. It pays United for all gas so received less the quantities consumed from its distribution system by Ideal and Scott and the other five direct purchasers from United. The City of Mobile makes no attempt to tax United's receipts from these sales to the distributor at wholesale but it collects this tax in full from the distributor when it in turn sells the same gas to its customers, the ultimate consumers. This is in keeping with the Natural Gas Act (15 U.S.C. § 717, *et seq.*) which places interstate sales at wholesale to a distributor (but not direct sales to consumers) beyond the reach of state and local taxation and regulation.

It is the position of United that direct sales of natural

gas to industrial consumers by interstate pipe line companies consummated within a city are sufficiently local in aspect that a city may require a license tax of the pipe line company, measured by its gross receipts from such sales, without offending the commerce clause. It is important not merely to United but also the City of Mobile and to municipalities generally, and to the natural gas industry, that this question of taxation be settled by this Court.

Collateral and, we submit, irrelevant questions arose in the Court of Appeals. Some were precipitated by language employed in the first opinion of that Court from which it receded in part in the subsequent opinions denying two petitions for rehearing. An excursion into these questions appears to be unnecessary and might tend to obscure the clear-cut question of the validity *vel non* of a city license tax on the privilege of making direct sales to industrial consumers within the city.

Involved here are the license taxes for 1956, 1957 and 1958 United paid direct to the City of Mobile on sales to Ideal and Scott. Ideal is located in the city itself where the 3% tax applies. Scott is in the adjoining police jurisdiction of the city where the tax rate is 1½%.

Jurisdiction of the District Court was invoked on the basis of diversity of citizenship under Section 1332 of Title 28, United States Code.

Reasons for Granting the Writs

(1) The Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court, to-wit: The validity of a municipal license tax on interstate pipe line companies on the privilege or business of making direct sales of natural gas to industrial consumers situated within the municipal-

ity. This question is of considerable interest and concern to many municipalities and to a substantial segment of the natural gas industry.

(2) This Court has not passed specifically on the validity of this type of municipal license tax. However, the Court of Appeals, in striking down the Mobile Tax, has reached a result in conflict with decisions of this Court in other pipe line cases holding that direct sales to industrial consumers are sufficiently local in character to support state regulation and taxation. Considerable uncertainty and confusion in this important area of state and local taxation is likely to result from the opinion of the Court of Appeals which should be settled.

Argument

On principle, if sales of natural gas may be taxed by the states without infringement of the commerce clause, such sales should also be taxable by municipalities. Yet the Court of Appeals has ignored, without any explanation or distinction, applicable decisions of this Court upholding state taxation and regulation of direct sales by interstate pipe line companies. The thread of these decisions is summarized in one of the opinions as follows:

> "This Court has often had occasion to rule that the retail sale of gas at the burner tips *by one who pipes the gas into the state*, or by a local distributor acquiring the gas from another who has similarly brought it into the state, is subject to state taxation and regulation." (Citing cases)
>
> *Memphis Gas Co.* v. *Beeler*, 315 U.S. 649, 653 (1942). (Emphasis supplied)

One of the early cases is *Pennsylvania Gas Co.* v. *Public Service Commission*, 252 U.S. 23 (1920). There it was held

that the transmission and sale of natural gas by a pipeline company from the producing state to consumers in another state is interstate commerce but subject to regulation by the state of the consumers because of the local nature of the direct sales to them. The Court said:

> "The thing which the State Commission has undertaken to regulate, while part of an interstate transmission, *is local in its nature*, and pertains to the furnishing of natural gas to local consumers within the city of Jamestown in the State of New York. The pipes which reach the customers served are supplied with gas directly from the main of the company which brings it into the State, nevertheless the service rendered is essentially local, and the sale of gas is by the company to local consumers who are reached by the use of the streets of the city in which the pipes are laid, and through which the gas is conducted to *factories* and residences as it is required for use. The service is similar to that of a local plant furnishing gas to consumers in a city." (Emphasis supplied) 252 U.S. at 30-31.

In a note to its opinion in a later case the Court cast aside any suggestion that because an industrial consumer purchases large quantities of gas, sales to it should fall in the "wholesale" category beyond the reach of state regulation:

> "Appellant contends that 'wholesale', *i.e.*, large quantity, service direct to industrial consumers, as exemplified by its sales to Anchor-Hocking, is to be distinguished from the sales in *Pennsylvania Gas Co. v. Public Service Comm'n*, 252 U.S. 23, which were made in a manner commonly associated with a local

distribution system supplying gas to consumers in a city. Nothing in the decision, however, requires it to be so limited. On the contrary, emphasis may rather be placed on the fact that both situations involve sales to ultimate consumers, Anchor Hocking being just as clearly in that category as the 'factories and residences' served by the company in the *Pennsylvania Gas Co.* case. See *Illinois Gas Co.* v. *Public Service Co.*, 314 U.S. 498, 505, where Chief Justice Stone, in summarizing the *Pennsylvania Gas Co.* case, stated that it involved gas 'sold directly to ultimate local consumers';"

Panhandle Eastern Pipe Line Co. v. *Public Service Commission*, 332 U.S. 507, 515, n. 10 (1947).

Another early case dealt with the right of a state to levy an occupational tax on a pipe line company located entirely within the state but selling and delivering gas in continuous interstate flow through connecting pipe lines. This Court held:

"The amounts were calculated on gross receipts derived wholly from appellant's intrastate business notwithstanding the gas used had moved in interstate commerce."

East Ohio Gas Co. v. *Tax Commission*, 283 U.S. 465, 472 (1931).

While *East Ohio*, just discussed, classified direct sales as intrastate in seeming conflict with *Pennsylvania Gas Co.* v. *Public Service Commission*, *supra*, the two cases reached the same result. Both upheld state taxation or regulation and that result has been adhered to in all the subsequent cases. It is now well established that such sales, although

a part of interstate commerce, are nevertheless sufficiently local in aspect to support state regulation and taxation.

> *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission*, 332 U.S. 507 (1947).

In the case just cited the Court pointed out that its decisions prior to the adoption of the Natural Gas Act (15 U.S.C. § 717, *et seq.*) had upheld state regulation of direct sales to local consumers and that Congress by adoption of that act had given legislative sanction to such regulation. The Natural Gas Act, like the decisions of this Court preceding it, placed the sale of natural gas for resale under federal regulation, but the act is careful to exclude from such regulation, and thereby leave subject to state regulation, direct sales to consumers.

> "Congress, it is true, occupied a field. But it was meticulous to take in only territory which this Court had held the states could not reach. That area did not include direct consumer sales, whether for industrial or other uses. Those sales had been regulated by the states and the regulation had been repeatedly sustained. In no instance reaching this Court had it been stricken down."

> *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission*, 332 U.S. 507, 519 (1947).

A similar line of demarcation was recognized by this Court in an electric power case wherein it cites the *Pennsylvania Gas* case, *supra:*

> "* * * the jurisdictional lines between local and national authority were not finally determined until this Court's opinion in *Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, 273 U.S. 83. * * *

Attleboro reiterated and accepted the holding of *Pennsylvania Gas Co. v. Public Service Commission*, 252 U.S. 23, that sales across the state line direct to consumers is a local matter within the authority of the agency of the importing state. * * *."

U.S. v. Public Utilities Commission, 345 U.S. 295, 303 (1953).

In a later "Panhandle case", *Panhandle Pipe Line Co. v. Michigan*, 341 U.S. 329 (1951), the pipe line company sought to escape state regulation of direct sales to large industrial customers, including Ford Motor Company, on the ground that such sales were interstate commerce and beyond state regulation because of the commerce clause. However, the Supreme Court upheld state regulation in the following language:

"The sale to industrial consumers as proposed by appellant is clearly interstate commerce. *Panhandle Pipe Line Co. v. Public Service Comm'n of Indiana*, 332 U.S. 507, 513; *Pennsylvania Gas Co. v. Commission*, 252 U.S. 23, 28. But the sale and distribution of gas to local consumers made by one engaged in interstate commerce is 'essentially local' in aspect and is subject to state regulation without infringement of the Commerce Clause of the Federal Constitution." 341 U.S. at 333.

. . . . . .

"It does not follow that because appellant is engaged in interstate commerce it is free from state regulation or free to manage essentially local aspects of its business as it pleases. The course of this Court's decisions recognizes no such license. *See Ohio Service* case, *supra*; *Panhandle Indiana* case, *supra*; *Pennsyl-*

rania Gas Co. v. Commission, 252 U.S. 23. "Such a course would not accomplish the effective dual regulation Congress intended, and would permit appellant to prejudice substantial local interests. This is not compelled by the Natural Gas Act or the Commerce Clause of the Constitution." 341 U.S. at 337.

The failure of the Court of Appeals to follow the foregoing cases is due to its own misconstruction of the taxing ordinance. Although the ordinance expressly taxes "the business of *selling or distributing* natural gas" the Court of Appeals has interpreted it to be a tax on the "privilege of making *deliveries*" instead of sales, and has held the delivery of the gas to be "an integral part of its movement in interstate commerce" instead of recognizing the local delivery as an element of the local sale. In its opinion of October 5, 1960, denying the first petition for rehearing the Court of Appeals construed its original opinion as follows:

> "We held that *delivery* of gas directly to industrial consumers in the City of Mobile *is an integral part of its movement in interstate commerce*, and that a tax on the *privilege of making deliveries* is a burden on interstate commerce." (Emphasis added) 282 F.2d at 580.

Because the tax ordinance is fortified by enforcement provisions, the Court of Appeals says the city has made "the procurement of a license a precondition of engaging in interstate commerce within its jurisdiction." (P. 30, Appendix A, opinion of September 2, 1960. See also page 27.) However, the tax is not on the right to transport

gas into or through the city. Vast quantities of gas are transported free of any city tax, either into the city for resale by the local distributor or enroute through the city's police jurisdiction to the Pensacola, Florida, area. The tax is not on the inter-state movement but on the local privilege of selling some of the gas in the City of Mobile at the end of the journey. As this privilege is taxable the city is entitled to reasonable means of enforcing the tax. We cannot imagine an effective tax without enforcement provisions.

The Court of Appeals has therefore dealt with the tax as if one on the act of transportation or delivery rather than on the act of selling. Its misconception of the tax is also apparent from the authorities on which it relies such as *Spector Motor Service v. O'Connor*, 340 U.S. 602 (1951), and *Railway Express Agency v. Virginia*, 347 U.S. 359 (1954). Both of these cases involved common carriers engaged exclusively in transporting the property of others for hire and dealt with taxes levied on this transportation business. Here, however, United is not a common carrier and employs its pipe lines only for the transmission of its own gas. Moreover, the tax is not on the act of transporting the gas but on the privilege of selling it in the City of Mobile at the end of its interstate journey. United has the dual characteristics of carrier and vendor, but it owns the gas that it carries and the receipts on which it is taxed by the City of Mobile are from sales and not from transportation, even though transportation enhances the sales price here just as it does on any other transported commodity.

The enhancement of the sales price because of transportation was necessarily a part of the gross receipts from gas sales in *East Ohio Gas Co., supra*. Transportation

increased the sales price of the coal delivered direct to the consumer in *McGoldrick* v. *Berwind-White Co.*, 309 U.S. 33, 58 (1940), where this Court said:

> "Here the tax is conditioned upon a local activity, delivery of goods within the state upon their purchase for consumption. It is an activity which, apart from its effect on the commerce, is subject to the state taxing power. The effect of the tax, even though measured by the sales price, as has been shown, neither discriminates against nor obstructs interstate commerce more than numerous other state taxes which have repeatedly been sustained as involving no prohibited regulation of interstate commerce."

Likewise, the interstate transportation was reflected in the gross receipts from the sale of goods brought into Indiana in *International Harvester Co.* v. *Department of Treasury*, 322 U.S. 340 (1944). This Court upheld "a privilege tax upon the receipt of gross income" on direct sales completed in the state in the following language:

> "We only hold that where a state seeks to tax gross receipts from interstate transactions consummated within its borders its power to do so cannot be withheld on constitutional grounds where it treats wholly local transactions the same way. Such 'local activities or privileges' (*McGoldrick* v. *Berwind-White Co.*, *supra*, p. 58) are as adequate to support this tax as they would be to support a sales tax. To deny Indiana this power would be to make local industry suffer a competitive disadvantage." 322 U.S. at 349.

So it is that the direct delivery by the seller to the purchaser-consumer within the local tax jurisdiction is itself a sufficient local activity to support a tax on the gross

receipts of the sale, whether as a sales tax or a privilege or license tax. The tax is on the privilege of making the local sale, not the interstate delivery. There can be no doubt but that the sales here are completed in the City of Mobile. Ideal and Scott have never contended to the contrary. The gas is delivered by the seller itself, United through its contractual agent, direct to the plant sites of Ideal and Scott in Mobile in accordance with their requirements. They purchase as they consume. The gas is metered at the plant sites by United's agent. Records are maintained and bills are sent out from an office in Mobile and Ideal and Scott pay for the gas at that office. Hence delivery and acceptance as well as payment, all of which are essential elements of a sale, take place within the City of Mobile. These local activities amply support this tax.

Conclusion

We respectfully submit that the Court of Appeals erred in equating a tax on the privilege of selling natural gas within the City of Mobile to a tax on the interstate delivery or transportation of the gas and, based on this erroneous equation, improperly invoked the commerce clause to invalidate the tax. For the reasons above set forth the petitioner prays that writs of certiorari be granted.

Respectfully submitted.

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 18103

IDEAL CEMENT COMPANY, *Appellant*,

versus

UNITED GAS PIPE LINE COMPANY, *Appellee*.

No. 18118

SCOTT PAPER COMPANY, *Appellant*,

versus

UNITED GAS PIPE LINE COMPANY, *Appellee*.

Appeals from the United States District Court for the Southern District of Alabama

(September 2, 1960)

Before RIVES, Chief Judge, and JONES and WISDOM, Circuit Judges

RIVES, Chief Judge: The issue in these cases is whether a municipal license tax is applicable to the business of distributing natural gas to industrial consumers within the municipality's taxing jurisdiction, when such distribution is the terminal act of the transportation of that natural gas from without the state. The tax is measured by gross receipts from sales of natural gas within the municipality's taxing jurisdiction.

The issue arises out of suits filed by the United Gas Pipeline Company against Ideal Cement Company and Scott Paper Company for reimbursement of such taxes paid by United on gas distributed to Ideal and Scott. Ideal and Scott defended on the ground that the tax reimburse-

ment articles[1] of their separate contracts with United did not obligate them to reimburse United for taxes not validly levied upon and paid by United, and that the tax could not validly be applied to gas distributions. Both Ideal and Scott assert that United's right to reimbursement fails entirely if the tax ordinance is found to be inapplicable. United's position is that, if the tax were held to be inapplicable, it would be obligated to credit Ideal and Scott with any amounts which United might recoup from the municipality. Thus the inapplicability of the tax would be either a complete or partial defense to United's actions.

If it appeared that United, on the one hand, and Ideal and Scott, on the other, were engaging in a friendly or simulated test, then the court should refuse to pass upon the applicability of the taxing ordinance.[2] When, however, as in this case, in pursuance of an honest and actually antagonistic assertion of rights and defenses by the one party against the other, there is presented a question in-

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[1] Each contract contains an article reading as follows:

"Tax Reimbursement. Buyer agrees to reimburse Seller for all taxes which may be levied upon and paid by Seller, or which Seller under contractual or legal obligation pays to the person or company on which such taxes are levied on or with respect to the gas delivered hereunder; provided, however, that no reimbursement shall be made to Seller under the provisions of this article for any taxes which were included in the weighted average price of gas under the provisions of the above Monthly Rate.

"The term 'taxes' as used herein shall mean any tax (other than ad valorem, income or excess profits taxes), license, fee or charge now or hereafter levied, assessed or made by any governmental authority on the gas itself or on the act, right or privilege of production, severance, gathering, transportation, handling, sale or delivery of gas which is measured by the volume, value or sales price of the gas in question; provided, however, that the term 'taxes' shall not be deemed to include any general franchise tax imposed on corporations on account of their corporate existence or on their right to do business within the State as a foreign corporation."

[2] Ashwander v. Valley Authority, 1936, 297 U.S. 288, 318, 346; Steamship Co. v. Emigration Commissioners, 1885, 113 U.S. 33.

volving the applicability[3] of a municipal ordinance, then, even though the municipality has not intervened or been made a party, and will not be bound under principles of res judicata, the court must proceed to determine the question as between the parties to the suit.[4]

United is a Delaware corporation, which has its principal place of business in Louisiana. It maintains pipelines for the transmission of natural gas from Louisiana into Mississippi, Alabama and Florida. In Alabama United distributes directly to seven industrial consumers located in the City of Mobile and its police jurisdiction, including Ideal and Scott, and to a local distributor, Mobile Gas Service Corp., which in turn services domestic, commercial and industrial customers of its own.

United brings gas into the Mobile, Alabama area from Mississippi and Louisiana by three pipelines and these pipelines converge at a station owned by United near the City of Mobile. At this station, the pressure of the gas is reduced by United from that at which it entered the State of Alabama. From this station, United has four pipelines, one of which continues on to Pensacola, Florida. The remaining three lines go to three separate metering stations where the gas is either sold to Mobile Gas Service Corporation or delivered into its pipelines. United has contracted with Mobile Gas Service Corporation to handle the distribution and metering of the gas in the City of Mobile, even to United's own customers, and likewise to

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[3] No question of the total unconstitutionality of the Mobile ordinance is presented, since the ordinance contains a savings clause which reads as follows: "No provision of this Code shall be applied: (b) so as to impose any unlawful tax or unlawful burden on interstate commerce or on any activity of the State or Federal Governments . . ."

[4] See Chicago & Grand Trunk Railway Co. v. Wellman, 1892, 143 U.S. 339; Coffman v. Breeze Corporations, 1945, 323 U.S. 316; Casey Jones, Inc. v. Texas Textile Mills, 5 Cir., 1937, 87 F.2d 454, 456; Soloman Tobacco Co. v. Cohen, 1906, 184 N.Y. 308, 77 N.E. 257; Wayne County Produce Co. v. Duffy-Mott Co., Inc., 1927, 244 N.Y. 351, 155 N.E. 669.

handle the accounting and collecting of revenues of sale. As compensation to Mobile Gas Service Corporation for the services so provided, United pays it a certain percentage of the money United collects from the sale of gas.

On June 28, 1946, Ideal entered into a contract with Mobile Gas Service Corporation for the sale and purchase of natural gas. Mobile Gas Service Corporation assigned this contract to United on November 1, 1954, and United subsequently sold and delivered natural gas to Ideal directly under said contract until July 25, 1956, when the agreement expired. On July 17, 1956, United and Ideal entered into a contract for the sale and purchase of natural gas for a term commencing on July 26, 1956 and ending January 1, 1965, which contract is still in effect, and under this contract substantial quantities of natural gas have been sold and delivered by United to Ideal.

Under the first contract (June 28, 1946), Ideal agreed to pay Mobile Gas Service Corporation, as seller, for any "increased or new tax" which might be imposed on it as a result of "'the production, severance, gathering, transportation, handling, sale or delivery of gas, or upon the right or privilege to produce, sever, gather, transport, handle, sell, or deliver gas." The tax in question, if applicable, is such an "increased or new tax."

In the second contract, that is, the one which has been in force since July 26, 1956, Ideal agreed to reimburse United for all taxes which might be levied upon and paid by United, or which United under contractual or legal obligation might pay to another person or company on which such taxes were levied with respect to gas delivered under such contract to Ideal.

On July 21, 1955, Scott and United entered into a contract for the purchase and sale of natural gas, which is still in force, and which contains a tax reimbursement article heretofore quoted in footnote 1.

United paid the taxes at issue in this case to the City of Mobile for the years 1956, 1957 and 1958, and has paid to Mobile Gas amounts equal to the increased taxes paid by

Mobile Gas for deliveries to Ideal and Scott pursuant to United's contract with Mobile Gas. These taxes were assessed in 1956 and 1957, and are in addition to the taxes paid directly to the City of Mobile by United for these years.

United made demands on Ideal and Scott for reimbursement, which demands were refused, on the ground that such taxes were not reimbursable under the contracts; whereupon United filed these actions.

There is no genuine issue as to any of the material facts. Consequently each of the parties filed a motion for summary judgment. Rule 56, Federal Rules of Civil Procedure. The district court, after stating the facts in more detail, denied the motions of Scott and Ideal and granted United's motion.[5]

The Mobile License Ordinance reads, in pertinent part, as follows:

"AN ORDINANCE,

"To fix the rate of annual licenses in the City of Mobile and in the police jurisdiction thereof.

"BE IT ORDAINED by the Board of Commissioners of the City of Mobile as follows:

"SECTION 1: The following is hereby declared to be and is adopted as the schedule of licenses for the year beginning January 1, 1955, and ending December 31, 1955, and for each subsequent year:

"(1) For practicing, engaging in, carrying on or conducting any exhibition, trade, vocation, occupation or profession in the City of Mobile, Alabama;

"(2) *For keeping, engaging in or carrying on business of any nature*, offering merchandise for sale, soliciting orders, or *making deliveries of any merchandise*, rendering or giving or selling service of any kind, taking orders for merchandise to be subsequently delivered by any agency or means, or accepting payments on orders for merchandise to be delivered sub-

[5] Reported in 176 F.Supp. 748.

sequently by any agency or means, any or all of which acts or transactions are done in or from the City of Mobile, Alabama;

"(3) *For entering the City of Mobile to do business*, to make sales, to make deliveries *or to do any act for which a license is required of businesses* located in the City of Mobile;

"(4) For storing, storing for sale or use, withdrawing from storage for sale or use, any or all of which acts or transactions are done in or from the City of Mobile;

"And each and every person, firm, company, association, partnership, agency or corporation, wherever located, engaging in or carrying on or doing any act or thing herein specified, in or from the City of Mobile, Alabama, shall pay the City of Mobile an annual license therefor as follows, to-wit:

. . . . . .

"193. GAS COMPANIES: Each person, firm or corporation engaged in the business of selling or distributing natural gas, in an amount equal to 3% of the gross receipts for the business transacted by such person, firm or corporation, in the City of Mobile for the preceding year from the sale of such natural gas sold or distributed from any point or points in the City of Mobile by such person, firm or corporation for any purpose whatsoever.

"The provisions of the above paragraph to be applied to operation in the Police Jurisdiction on the basis of 1½% of said gross receipts." (Emphasis supplied.)

From the terms of the ordinance, the Mobile license tax applies to the United Gas Pipe Line Company from the time its gas *enters* the *City of Mobile* for the purpose of delivery to Scott and Ideal. Moreover, procurement of a license is a prerequisite to United distributing its gas

within the City of Mobile. This is made evident by Section 19 of the Ordinance:

> "SECTION 19; That any person, firm, association or corporation, who shall engage in any business, trade or profession, or keep any establishment, or do any business or any act for which a license is required by the foregoing ordinance, *without having first obtained such license*, shall, upon conviction, for each day such business, trade or profession or such establishment is kept or carried on and for each act so done, without such license, be fined not less than one nor more than one hundred dollars, and may also be sentenced to imprisonment for not exceeding six months." (Emphasis supplied.)[6]

Thus, United must pay a tax each year before it can supply gas to Scott and Ideal within the City of Mobile.[7] If these deliveries to Scott and Ideal within the City of Mobile are part of the flow of interstate commerce, the ordinance is inapplicable, for it would be a tax whose payment is a precondition to exercising the privilege of engaging in interstate commerce "and that avenue of approach had long been declared unavailable under the Commerce Clause."[8]

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[6] See also Alabama Code of 1940, Tit. 37 Municipal Corporations, § 754:

> "It shall be unlawful for any person, firm, or corporation, or agent of a firm or corporation, to engage in any of the businesses or vocations in a city for which a license may be required *without first having procured a license therefor* . . ." (Emphasis supplied.)

[7] Although the tax is *measured* by the previous year's receipts, the amount so determined must be paid *prior* to doing business in the City of Mobile *each year*.

[8] Northwestern Cement v. Minnesota, 1959, 358 U.S. 450, 464. See Spector Motor Service v. O'Connor, 1951, 340 U.S. 602; Underwood Typewriter Co. v. Chamberlain, 1920, 254 U.S. 113, 119.

The crucial question to be decided, therefore, is whether the gas is moving in interstate commerce when it enters the City of Mobile—at which point the Mobile City tax becomes operative upon it. Everyone agrees that when the gas flows from Louisiana across the Alabama border it is in interstate commerce. We must search, therefore, for some point subsequent to its entry into Alabama at which this interstate commerce is transformed into intrastate commerce, or, at least, becomes *separable* from interstate commerce.[9] Appellee contends that this point of separation is delivery of the gas by United into the distribution system of the Mobile Gas Service Corporation and the reduction in pressure of the gas by both companies within Alabama, prior to its delivery to Scott and Ideal. But the mere fact that the gas moves from pipelines owned by United to pipelines owned by Mobile Gas, without more, is not a sufficient separation, for to this point there has been no change whatsoever in the commodity being shipped. "The separation must be realistic."[10] Thus it must be that the separation from interstate commerce is effected, if at all, by the reduction in the pressure at which the gas is being transported. But is this change any more "realistic"? We think not. Changes are made in gas pressures to facilitate the movement of the gas through the pipelines. Pressures are increased prior to shipment and during the course of shipment, and the pressures are reduced as the gas approaches the ultimate consumers.[11] The gas, however, is moving all the time. The flow of gas from Louisiana to the Ideal and Scott plants is "steady and continuous."[12] It may be that the process of breaking

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[9] See Michigan-Wisconsin Pipe Line Co. v. Calvert, 1954, 347 U.S. 157, 169.

[10] Ibid.

[11] State Tax Commission v. Gas Co., 1931, 284 U.S. 41, 43-44 (Holmes, J.).

[12] See Michigan-Wisconsin Pipe Line Co. v. Calvert, 1954, 347 U.S. 157, 163.

down gas for distribution to local domestic consumers closely resembles the "breaking of an original package,"[13] although the vitality of this "merely mechanical consideration" is open to serious question.[14] We find, however, that the reductions in gas pressure prior to delivery to Scott and Ideal are not sufficiently "realistic" changes to separate the gas from the flow of interstate commerce as it crosses into the jurisdiction of the City of Mobile.[15]

In the course of its argument appellee concedes that sales of gas to industrial consumers in the circumstances of this case are interstate commerce, but argues that these interstate shipments are accompanied by local incidents subject to local taxation.[16] But they fail to go on to meet the question before us, which is whether the City of Mobile has chosen to levy its tax on those local incidents, or whether it has chosen to directly tax the flow of interstate commerce.[17] Thus, appellee contends that the City of Mobile could validly tax *sales* of gas by United to Scott and Ideal. That may be so. But the City has not attempted to tax United's sales made in Mobile, nor the "use" of

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[13] See East Ohio Gas Co. v. Tax Commission, 1931, 283 U.S. 465, 471; Memphis Gas Co. v. Beeler, 1942, 315 U.S. 649, 653.

[14] See Panhandle Pipe Line Co. v. Commission, 1947, 332 U.S. 507, 512.

[15] *Cf.* State Tax Commission v. Gas Co., 1931, 284 U.S. 41, 43-44 (Holmes, J.).

[16] See Pennsylvania Gas Co. v. Public Service Commission, 1920, 252 U.S. 23; Panhandle Eastern Pipe Line Co. v. Public Service Commission, 1947, 332 U.S. 507; Texas Gas Transmission Corp. v. Atkins, Tenn. 1954, 270 S.W.2d 384.

We do not decide whether United's total activities in Mobile provide a sufficient "nexus" for the City to levy a tax without offering *due process*. See Scripto v. Carson, 1960, 362 U.S. 207.

[17] That the tax is apportioned, so that it cannot be duplicated, and does not discriminate against interstate commerce, does not alter its invalidity if the tax is one on the privilege of engaging in interstate commerce. See Spector Motor Service v. O'Connor, 1951, 340 U.S. 602, 609.

the gas sold by United, nor United's property in Mobile.[10] "One must comprehend . . . the difference between the use of magic words or labels validating an otherwise invalid tax and their use to disable an otherwise constitutional levy. The latter this Court has said may sometimes be done."[11] What the City has done in this case, by the words of its ordinance, is to make the procurement of a license a precondition of engaging in interstate commerce within its jurisdiction.

Nor is the evil attending license taxes[12] on interstate commerce merely a question of labels. Provisions for the levy of license taxes are ordinarily accompanied by summary collection procedures.[13] So here, the Alabama Code provides for injunctions against firms who fail to pay municipal license taxes on time.[14] Thus, the effect of nonpayment of a license tax is not the usual slight disruption of commerce which may follow a levy on a delinquent taxpayer's property. Rather, interstate commerce is brought to an immediate halt by means of the injunctive remedy. Moreover, doing business without a license will bring down upon the violator extreme criminal sanctions.[15]

[10] See McLeod v. Dilworth, 1944, 322 U. S. 327, 330; Spector Motor Service v. O'Connor, 1951, 340 U. S. 602. The fact that the tax is measured by gross revenue is not inconsistent with its being a tax on the *privilege* of doing business. Railway Express Agency v. Virginia, 1954, 347 U. S. 359, 367.

[11] Railway Express Agency v. Virginia, 1959, 358 U. S. 434, 441.

[12] Id. at 438, 448.

[13] That the means whereby a tax is to be collected is relevant to a consideration of its effect on commerce is emphasized in Northwestern Cement Co. v. Minnesota, 1959, 358 U. S. 450, 462; Underwood Typewriter Co. v. Chamberlain, 1920, 254 U. S. 113, 119.

[14] See Alabama Code of 1940, Tit. 37, Municipal Corporations, §§ 760-764, entitled "Cumulative Remedies for Collection of License Tax."

[15] See, *e. g.*, Section 19 of the Mobile License Ordinance, quoted in text *supra*.

Since the Mobile City license tax was inapplicable to sales of gas by United to Scott and Ideal, the district judge erred when he granted summary judgment for United. The judgments are reversed and the causes remanded.

REVERSED AND REMANDED.

A true copy.

Test:

EDWARD W. WADSWORTH,
Clerk, U. S. Court of Appeals, Fifth Circuit,
New Orleans, Louisiana.

December 5, 1960.

APPENDIX B

(October 5, 1960)

ON PETITION FOR REHEARING

Before RIVES, Chief Judge, and JONES and WISDOM, Circuit Judges

PER CURIAM: United raises certain questions concerning the opinion of the Court, which we shall briefly attempt to clarify.

We held that the tax is on the act or privilege of delivering gas in the City of Mobile. This is the *incidence* of the tax.

Next, we decided that the delivery of the gas as the terminal act of its transportation from without the State is inseparable from interstate commerce, and not merely a "local incident" of such commerce. In our discussion of this point, we said: "The crucial question to be decided, therefore, is whether the gas is moving in interstate commerce when it enters the City of Mobile at which point the Mobile City tax becomes operative *upon it*." (Emphasis supplied.) We did not mean, by that sentence, to convey the idea that the tax is being levied on the gas itself. The *incidence* of the tax was resolved earlier in the opinion. At the juncture at which the quoted sentence appears in the opinion we were concerned only with determining where the act taxed by the City of Mobile stood in relation to the flow of interstate commerce. We held that delivery of the gas directly to industrial consumers in the City of Mobile is a integral part of its movement in interstate commerce, and that a tax on the privilege of making such deliveries is a burden on interstate commerce.

The petition for rehearing is

DENIED.

A true copy.

Test:

EDWARD W. WADSWORTH,
Clerk, U. S. Court of Appeals, Fifth Circuit,
New Orleans, Louisiana.

December 5, 1960.

APPENDIX C

(November 16, 1960)

ON SECOND PETITION FOR REHEARING

Before RIVES, Chief Judge, and JONES and WISDOM, Circuit Judges

PER CURIAM: To clear up any ambiguity which may remain in our opinion and holding, we intended to hold and do hold that the Mobile City license tax is inapplicable as to gross receipts for the gas distributed by United directly to Ideal and Scott. In our opinion, however, the tax is applicable to the gross receipts of the local distributor, Mobile Gas Service Corporation.

United properly reimbursed Mobile Gas for the increased taxes paid by Mobile Gas on account of distributions to Ideal and Scott pursuant to United's contract with Mobile Gas.

The second petition for rehearing is

DENIED.

A true copy.
Test:

EDWARD W. WADSWORTH,
Clerk, U. S. Court of Appeals, Fifth Circuit,
New Orleans, Louisiana.

December 5, 1960.